

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

In Re: BISPHENOL-A (BPA)
POLYCARBONATE PLASTIC
PRODUCTS LIABILITY LITIGATION

MDL Docket No. 1967
Master Case No. 4:08-1967-MD-W-ODS

The Hon. Ortrie D. Smith

This document relates to:

ORAL ARGUMENT REQUESTED

Broadway, et al. v. Avent America, Inc., et al., C.A. No. 08-00997;

Broadway, et al. v. Evenflo Company, Inc., C.A. No. 08-00309;

Broadway, et al. v. Playtex Products, Inc., C.A. No. 08-00999;

Coyle, et al. v. Nalge Nunc International Corporation, C.A. No. 08-00996;

Raggio, Jr., et al. v. Gerber Product Company, C.A. No. 08-00418;

Rasmussen, et al. v. Handi-Craft Company, C.A. No. 08-01000;

Tubbs v. RC2 Corporation, C.A. No. 08-00998

**DEFENDANTS PHILIPS ELECTRONICS NORTH AMERICA CORPORATION,
EVENFLO COMPANY, INC., GERBER PRODUCTS CO., HANDI-CRAFT COMPANY,
PLAYTEX PRODUCTS, LLC, NALGE NUNC INTERNATIONAL CORPORATION AND
RC2 CORPORATION'S MOTION FOR RECONSIDERATION OR, IN THE
ALTERNATIVE, FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(B)**

Defendants Philips Electronics North America Corporation, Evenflo Company, Inc., Gerber Products Co., Handi-Craft Company, Playtex Products, LLC, Nalge Nunc International Corporation and RC2 Corporation (collectively, the “Bottle Defendants”) respectfully seek this Court’s reconsideration or, alternatively, certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), of this Court’s Order and Opinion Addressing Certain of Defendants’ Motions to Dismiss (the “Order”).

1. On November 9, 2009, this Court granted in part, denied in part, and deferred in part Defendants’ motions to dismiss, ultimately permitting claims against the Bottle Defendants for fraudulent and negligent omissions of material fact and breach of the implied warranty of merchantability brought by those Plaintiffs who still possessed any of the challenged products at the time they learned about BPA and its potential health effects. (Order at 23.)

2. This Court also allowed that, if Plaintiffs prove these claims, benefit-of-the-bargain damages would be available. (*Id.* at 19.)

3. By contrast, this Court dismissed all claims (except for unjust enrichment) of Plaintiffs “who disposed of or used the products before learning about BPA,” ruling that these Plaintiffs “received 100% use (and benefit) from the products and have no quantifiable damages.” (*Id.* at 20.) In evaluating Plaintiffs’ unjust enrichment claims, this Court held that even those Plaintiffs who completely consumed the Bottle Defendants’ products could still seek to recover any benefit they conferred upon the Bottle Defendants. (*Id.* at 21.)

4. The Eighth Circuit’s holdings in *Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999), and *O’Neil v. Simplicity, Inc.*, 574 F.3d 501 (8th Cir. 2009), mandate the dismissal of all of Plaintiffs’ claims, including for unjust enrichment, because Plaintiffs have not alleged personal injury or property damage in these cases.

5. Furthermore, Plaintiffs who completely consumed the products they purchased do not allege any “injury in fact” necessary to establish constitutional standing to assert their unjust enrichment claims because they do not allege any personal injury or property damage and, as this Court has observed, they “received 100% use (and benefit) from the products.” (Order at 20.)

6. Therefore, both this Court’s (i) denial in part of Bottle Defendants’ “no injury” motion to dismiss and (ii) determination that Plaintiffs who “received 100% use (and benefit) from the product and have no quantifiable damages,” Order at 20, may nonetheless assert unjust enrichment claims constitute manifest errors of law that this Court has the inherent authority to, and should, correct, pursuant to Federal Rule of Civil Procedure 59(e).

7. Should the Court not amend its Order, these legal issues nonetheless satisfy the standard for certifying an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

8. At a minimum, this Court’s Order presents two important questions of law, the resolution of which by the Eighth Circuit may significantly advance the disposition of this case, if not terminate it entirely:

1. Whether, under *Briehl* and *O’Neil*, claims for restitution or damages (including benefit-of-the-bargain damages) can survive, even when all Plaintiffs affirmatively allege that they used the challenged products and concede that they have not suffered any injury whatsoever to person or property?
2. Whether, under *O’Neil*, even when the Plaintiffs have “received 100% use (and benefit) from the product and have no quantifiable damages,” Order at 20, a claim for unjust enrichment may survive?

9. Both questions satisfy all the statutory requirements for certifying a question for interlocutory appeal, and an immediate, interlocutory appeal should therefore be allowed. *See* 28 U.S.C. § 1292(b).

The Bottle Defendants hereby incorporate the Suggestions in Support of their Motion for Reconsideration or, in the Alternative, for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292 (b).

The Bottle Defendants respectfully request oral argument pursuant to Local Rule 7.1(g).

WHEREFORE, the Bottle Defendants respectfully request that this Court reconsider, or alternatively certify for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), its Order and Opinion Addressing Certain of Defendants' Motions to Dismiss, and for all further relief as this Court finds to be just and proper.

Respectfully submitted,

SULLIVAN & CROMWELL LLP

By /s/ Michael H. Steinberg
Michael H. Steinberg
Brian R. England
1888 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 712-6600
Fax: (310) 712-8800
steinbergm@sullcrom.com
englandb@sullcrom.com

THOMPSON COBURN LLP

David Wells
Jacqueline T. Albus
One US Bank Plaza
St. Louis, MO 63101
Telephone: (314) 552-6000
Fax: (314) 552-7000
dwells@thompsoncoburn.com
jalbus@thompsoncoburn.com

*Attorneys for Defendant
Philips Electronics North America
Corporation*

BRYAN CAVE LLP

By /s/ Robert M. Thompson
Robert M. Thompson #38156
1200 Main Street
One Kansas City Place, Suite 3500
Kansas City, MO 64105-2130
Telephone: (816) 374-3429
Fax: (816) 374-3300
rmthompson@bryancave.com

Dan H. Ball
Peter W. Herzog III
211 N. Broadway, Suite 3600
St. Louis, MO 63102
Telephone: (314) 259-2000
Fax: (314) 259-2020
dhball@bryancave.com
pwherzog@bryancave.com

*Attorneys for Defendant
Evenflo Company, Inc.*

HERZOG CREBS LLP

By /s/ Peter W. Herzog
Peter W. Herzog
Michael A. Vitale
100 North Broadway, 14th Floor
St. Louis, MO 63102-2728
Telephone: (314) 231-6700
Fax: (314) 231-4656
pwh@herzogcrebs.com
mav@herzogcrebs.com

*Attorneys for Defendant
Handi-Craft Company*

STEPTOE & JOHNSON, LLP

By /s/ Jason Levin
Lawrence Riff
Jason Levin
633 West Fifth Street, Suite 700
Los Angeles, CA 90071
Telephone: (213) 439-9400
Fax: (213) 439-9599
lriff@steptoe.com
jlevin@steptoe.com

*Attorneys for Defendant
Nalge Nunc International
Corporation*

LATHAM & WATKINS LLP

By /s/ William K. Rawson
William K. Rawson
Mary Rose Alexander
555 Eleventh Street, N.W., Suite
1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Fax: (202) 637-2201
william.rawson@lw.com
mary.rose.alexander@lw.com

**STINSON MORRISON HECKER
LLP**

John W. Moticka #31760
168 North Meramec Avenue, Suite
400
St. Louis, MO 63105-3758
Telephone: (314) 259-4562
Fax: (314) 259-4467
jmoticka@stinson.com

Kristin L. Farnen #30620
1201 Walnut, Suite 2900
Kansas City, MO 64106
Telephone: (816) 842-8600
Fax: (816) 691-3495
kfarnen@stinson.com

*Attorneys for Defendant
Playtex Products, LLC*

ICE MILLER LLP

By /s/ Judy S. Okenfuss
Judy S. Okenfuss
One American Square
Suite 2900
Indianapolis, IN 46282-0200
Telephone: (317) 236-2115
Fax: (317) 592-4721
judy.okenfuss@icemiller.com

*Attorneys for Defendant
RC2 Corporation*

WHITE & CASE LLP

By /s/ Bryan A. Merryman
Bryan A. Merryman
Rachel J. Feldman
633 W. Fifth Street, Suite 1900
Los Angeles, CA 90071
Telephone: (213) 620-7700
Fax: (213) 452-2329
bmerryman@whitecase.com
rfeldman@whitecase.com

**FOLAND, WICKENS,
EISFELDER,
ROPER & HOFER, P.C.**

Joseph J. Roper
911 Main Street, Suite 3000
Kansas City, MO 64105
Telephone: (816) 472-7474
Fax: (816) 472-6262
jroper@fwpclaw.com

*Attorneys for Defendant
Gerber Products Co.*

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2009, the foregoing instrument was filed with the Clerk of Court using the ECM/ECF system, which will send a notice of electronic filing to all attorneys of record.

/s/ David Wells

Attorney for Defendant Philips
Electronics North America Corporation